IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

ELECTION PETITION No 9 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE R.P.DHOLAKIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

DAHYABHAI PITAMBERDAS PATEL

Versus

MOHANBHAI HIRABHAI PATEL

Appearance:

MR PK JANI for Petitioner

HL PATEL ADVOCATES for Respondent

CORAM : MR.JUSTICE R.P.DHOLAKIA

Date of decision: 18/12/2000

C.A.V. JUDGEMENT

This petition under Secs.80-A and 81 of the Representation of the Peoples Act, 1951 (hereinafter referred to as `the Act') is preferred to quash and set aside the election of the respondent from 91 Patan

Legislative Assembly Constituency.

2. The petitioner, under the authorization of Janata Dal Party filed his nomination paper to contest the election of 91 Patan Legislative Assembly Constituency. The respondent also filed his nomination paper to contest the said election of the said Assembly Constituency under the authorization of Bharatiya Janata Party and there were six candidates for the election which was due to be held on 28-2-1998.

2.1 It is stated by the petitioner that a news item was published in "Gujarat Samachar" by the respondent or his agents just a day prior to the election stating therein that the petitioner withdrew his candidature in favour of respondent-Shri Mohanbhai H. Patel which, according to the petitioner, had been given without any express or implied authority from either the petitioner or from his recognized agent. It is further stated by him that copies of the newspaper were widely distributed and announced by the respondent and his supporters that the petitioner had retired from the election in favour of the respondent. It is submitted that the respondent manoeuvered in giving the advertisement that the petitioner has withdrawn his candidature favouring the respondent. According to him, the said item was published in the newspaper in order to create a confusion in the minds of voters and to spoil the petitioner's prospects in the election.

2.2 It is contended that, in complete disregard of the provisions of Representation of Peoples Act and Code of Conduct for election, the respondent circulated large number of phamlets and also distributed ball pens, key chains and other gift articles to them in order to secure votes in his favour. It is alleged that the respondent solicited the voters in the name of religion by publishing calenders bearing the pictures of Hindu Gods and he spent more amounts than what is fixed by the Election Commission. According to him, large number of voters who were to vote in favour of the petitioner did not vote for him and voted in favour of the respondent as a result of which, the respondent was elected. He has contended that if the aforesaid news item had not been given in the newspaper, the respondent would not have been elected and, therefore, the respondent is guilty of corrupt practice in the election by deliberately applying the corrupt means which materially affected the election.

2.3 Therefore, a complaint was filed before the Police Officer In-Charge of Patan City Police Station on

27-2-1998. It is further stated by him that said complaint was not entertained by the petitioner as it was not the proper form and asked him to file before the appropriate forum. Since corrupt practice was adopted by the respondent, the petitioner was prejudiced in the election and large number of his supporters and voters did not vote for him. It is stated that an application dated 2-3-1998 was given to the Returning Officer not to declare the results, but the same was rejected as a consequence of which, the result of 91 Paten Legislative Assembly was declared in Form No.21E read with Rule 64 of Election Rules, 1961. It was further stated that after declaration of the result, the respondent was declared elected as a candidate. The respondent secured 40,421 votes whereas petitioner secured 4,714 votes. According to the petitioner, because of the statement published in the newspaper by the respondent that the petitioner's candidature was withdrawn in favour respondent, a confusion was created in the mind of the voters that the petitioner had withdrawn from the candidature and, therefore, large number of voters did not vote for him as a result of which, he secured less number of votes and he was not declared elected. Therefore, the petitioner has moved this election petition praying to declare the election of the respondent as cancelled and consequently to set aside the same.

3. This Court (Coram: S.D.Pandit,J.) vide order dated 2-7-1998 issued summons calling upon the respondent to appear before the Court on 30-7-1998. On 18-8-1998, learned advocate appearing on behalf of the respondent, Mr.V.H.Patel sought time to file written statement which was granted and matter was adjourned. Thereafter, matter was placed before this Court as per the order passed by Hon'ble the Chief Justice.

4. The respondent submitted his written statement on 11-9-1998 denying specifically all the allegations and contentions made in the election petition. It was contended that the petition is not maintainable as the petitioner had not filed the affidavit as required under Rule 94(A), Form 25 of the Conduct of Election Rules, 1961. It was also contended that the petition is not in accordance with the provisions of Sections 81, 82 and 83 of the Act more particularly under Secs.100 and 101 of the said Act. According to him, no cause of action had arisen to file the present petition and under Sec.83 of the Act, full particulars of the alleged act of corrupt practice have to be produced by the petitioner and therefore, the petition is required to be rejected. It was admitted by the respondent that the petitioner had

not withdrawn from the contest but the respondent denied to have published the advertisement in Gujarat Samachar on 27-2-1998 and circulated it that the petitioner had withdrawn from the contest in favour of the respondent and he was unaware of any such advertisement. Regarding the complaint alleged to have been filed by the petitioner before Patan City Police Station on 27-2-1998, it was contended that the officer in-charge of the said police station had informed him that no cognizance of the said complaint could be taken as it was not the appropriate forum. It was denied that he had created confusion in the mind of voters and supporters. It was further contended that looking to the totality of the situation, his prospects of winning the election was more high than that of the petitioner and submitted that the petitioner had no locus standi to file the present petition and, therefore, the election petition be dismissed and heavy cost be imposed upon the petitioner.

5. Considering the rival contentions raised by the parties, following issues were framed at Ex.23 in the presence of both the parties:

(1) Whether the petitioner proves that the respondent and/or his agents at his instance gave an advertisement in daily newspaper "Gujarat Samachar" on 27-2-1998 advertising that the petitioner has withdrawn his candidature in favour of respondent and by way of doing so, is he guilty of corrupt practice in the election ?

(2) Whether the petitioner proves that the respondent is guilty in applying unfair and corrupt means in the election as averred in paragraph 13 of the petition. If yes, then what will be its effect ?

(3) Whether the respondent proves that the petition filed by the petitioner is not maintainable nor tenable in eye of law as averred in paragraphs 2(a) to 2(e) of his written statement ?

(4) What order ?

6. My findings to the above issues are as under:

(1) In negative

(2) In negative

(3) In negative

(4) As per final order

7. Thereafter, the parties have produced documentary evidence in support of their case and learned advocate appearing for the respective parties have submitted purshis Exs.24 and 27 declaring that they do not require any more documents to be brought on record. Learned advocate for the petitioner, vide Ex.25, has submitted a list of witnesses to be examined by the petitioner.

8. The petitioner has examined number of witnesses to prove his case. He has examined himself at Ex.28. He has also examined witness No.2-Shankarbhai Dayaljibhai Patel at Ex.31; witness No.3-Narottambhai Tribhovandas Patel at Ex.32; witness No.4-Shiraj Shantilal Zaveri at Ex.35 and witness No.5-Jayendrabhai Prahladbhai Brahmbhatt at Ex.45. However, the respondent did not examine any witness, but he has cross-examined the witnesses brought by the the petitioner.

9. I have heard learned advocate for the petitioner Mr.P.K.Jani as well as learned advocate for the respondent Mr.V.H.Patel at length. Since the issue involved in this petition and the documentary and oral evidence are such that I have decided to reply the issues by a common reasoning.

10. The petitioner in his examination-in-chief has stated that he is a public worker and he has enjoyed the status of Deputy Sarpanch of Village Pali; President of Co-operative Society, Pali; Chairman of Pali Milk Produce Co-Operative Society; Member of Taluka Panchayat, Patan; Director of Patan Taluka Sales and Purchase Union for the period from 1975 to 1980 and also a Member of Legislative Assembly for the period from 1980 to 1985 from Patan Constituency. He has deposed that he is holding the post of Vice President of Mehsana District Central Co.Op. Bank for the last seven years. He has further deposed that consequent upon issuance of notification dated 28-1-1998, he has submitted his form from Patan Legislative Assembly Constituency as a candidate for the Janata Dal. Similarly the form in respect of respondent was also submitted as a candidate for Bharatiya Janata Party and their forms were accepted. There were six persons contesting for the election from Patan Assembly Constituency. According to him, an advertisement was appeared in the Gujarat Samachar on 27-2-1998 which was published by the respondent stating that he has withdrawn his candidature extending support to the respondent and because of this advertisement, the voters were confused and so also his supporters. Therefore, he has made a

complaint before the Patan Police Station, but no cognizance of it was taken as it had no jurisdiction. He has further stated that since the complaint dated 27-2-1998 is still pending before the Returning Officer, he would not be able to depose anything further. Thereafter on 30-7-1999, he has further deposed in his examination-in-chief that in view of the code of conduct, he could not do anything in response to the advertisement that had appeared in the newspaper on 27-2-1998 as the election was scheduled to be held on 28-2-1998. He has further deposed that he came to know regarding the advertisement dated 27-2-1998 while reading on the day it was published and according to him, it was published at the behest of opposition candidate i.e. Mohanbhai Hirabhai Patel. He has further deposed that Gujarat Samachar is a widely published newspaper in Patan area and people largely used to read it and because of the above advertisement published on 27-2-1998, his supporters felt that he has withdrawn himself as a candidate from the Patan Assembly Constituency in favour of Mohanbhai Hirabhai Patel. He has further deposed that there was no time gap in between date of election and the date of publication of advertisement as the election was held on 28-2-1998 and news item was published on 27-2-1998 and therefore, he could not publish counter advertisement or he could not contact his supporters on a large scale as a result of which, his candidature was affected. He has further deposed that because of the advertisement, people were telling him that they have read the advertisement in Gujarat Samachar on 27-2-1998 stating that he has withdrawn his candidature and hence, there is no question of casting vote in his favour. He has further deposed that pursuant to the election, as the counting was to be done at Polytechnic College, Patan on 2-3-1998, he has submitted a written application to Returning Officer not to count and declare the result, but said application was rejected. It has been specifically deposed by him in last para of his examination-in-chief that during the election campaign, he had an opportunity to see the idols of Lord Ram and Sita being distributed as also other gift articles showing the same signals. It has been finally deposed by him that main issue which has come in his way was the advertisement dated 27-2-1998 and because of that, he has lost the election.

10.1 The petitioner was cross-examined at length by the learned advocate for the respondent, Mr.V.H.Patel. He has admitted in his cross-examination that when he was a member of Bharatiya Janata Party during the period from 1995 to 1996, he was elected as a Member of District

Panchayat. He has also admitted that in the year 1996-1997 he was the Chairman of GROFED and that said appointment was made by RJP Government. It has been further admitted by him that, in all, three times he has contested the election for the assembly seats and in 1985, he has lost the election from the Patan Assembly when he was contesting it as a candidate of Janata Party. He has categorically admitted in his cross-examination that "it is true that I had no personal knowledge that the above advertisement was given by Mohanbhai Hirabhai Patel. Whatever I have deposed was deposed on the ground that it has been specifically mentioned that I have withdrawn myself in favour of Mohanbhai H. Patel". He has further admitted that "it is true that I have tried to contact the voters of my constituency through my supporters and I have tried to inform my voters that I have not withdrawn my candidature". It was further admitted by him that "it is true that in my application, nowhere I have stated that they were distributing the idol of God Ram and Sita". It was also admitted by him that in the election, he has received 4,714 votes, the person who has been declared elected has received 41,421 votes, the candidate of RJP, Kantilal N. Patel received 30,900 votes and Dhanjibhai K.Patel who belongs to Indian National Congress has secured 7,145 votes.

11. In support of his say, Shri Shankarbhai Dayaljibhai Patel was examined at Ex.31 as petitioner's witness No.2. Shri Shankarbhai has deposed in his deposition that he is one of the voters of 91 Patan Taluka Assembly Constituency and he does not belong to any political party. It was deposed that there were four candidates for the M.L.A. seats in the said constituency in the year 1998 and he knows the petitioner. It was further deposed by him that after the meeting of BJP, the supporters of Shri Mohanbhai Patel were distributing gift articles namely sticker, pen, key chain and calender. According to him, because of the news advertisement, he and others have voted in favour of BJP candidate.

11.1 This witness has admitted in his cross-examination that he knows the petitioner prior to the 1985 and he has come for deposition in the Court at the request of the petitioner. It was admitted by him that on the day of election, he had visited Patan but not contacted or enquired from the petitioner about the news item. It was further admitted by him that he came to know about the news item on the date of election. He has stated that he does not know as to who had informed him that Dahyabhai has not withdrawn himself from the election. He has admitted that he lost in the election

which was held in the year 1995 by a margin of 228 votes while he was a candidate of BJP for Patan Taluka Sander area. He has further admitted that because of the criminal complaint lodged against him in the year 1985, he remained in judicial for about a month. He has further admitted that he does not know the names of persons who were distributing the gift articles.

12. Another witness examined by the petitioner is Shri Narottambhai Tribhovandas Patel at Ex.32. He has stated in his deposition that because of the news item, supporters of Dahyabhai Pitambardas Patel has decided to vote in favour of Mohanbhai Hirabhai Patel. In his cross-examination, he has admitted that he came to know regarding the incorrectness of the news item for the first time after about a week. He has also admitted that he has come to depose in the Court at the request of the petitioner.

13. Petitioner has examined another witness namely, Shiraj Shantilal Zaveri at Ex.35 as witness No.4. He has deposed that he is working as a Chief Accountant in Gujarat Samachar (Lok Prakashan Ltd.). According to him, the release order in respect of advertisement in question was issued by Metro Advertising along with mark 34/4 which was in the handwriting of one Jayendrabhai Brahmbhatt. By way of this witness, the petitioner has tried to prove that the advertisement in question was given by Jayendrabhai Brahmbhatt through Metro Advertising and cash amount for the draft advertisement has been paid by said Metro Advertising.

14. Petitioner has examined said Jayendrabhai Brahmbhatt at Ex.45. He has deposed that Metro Advertising is a partnership firm and he is looking after the day-to-day affairs of the said firm for the last 15 years. He has deposed that the person who wanted to give advertisement in Gujarat Samachar has approached him with the draft advertisement and, therefore, he went along with him to the office of Gujarat Samachar and handed over the same there and due receipt for having paid the cash amount towards the same was given to that person.

15. The petitioner has, in all, examined four witnesses to support his case apart from himself. The whole base of the petition rests on the advertisement dated 27-2-1998 and according to petitioner, though the petitioner had not withdrawn from the election, this news item came to be published in the Gujarat Samachar by the respondent Mohanbhai Hirabhai Patel just a day prior to the date of election stating that the petitioner has

withdrawn himself from the election. This has created confusion in the mind of voters and large number of voters who were to vote in favour of the petitioner did not vote for him instead voted in favour of the respondent as a result of which, the respondent was elected.

16. It is argued by the learned advocate for the petitioner that the respondent is guilty of corrupt practice in the election by deliberately applying the corrupt means. To prove the same, petitioner has examined himself, Shri Shiraj Shantilal Zaveri who is the Chief Accountant of Gujarat Samachar (Lok Prakashan Ltd.) as witness No.4 at Ex.35 and Jayendrabhai Prahladbhai Brahmbhatt as witness No.5 at Ex.45. By way of these two witnesses, petitioner has tried to prove that the advertisement in question has been given for the purpose of publishing it in the daily newspaper "Gujarat Samachar" on 27-2-1998 by the respondent. The Chief Accountant of Gujarat Samachar Shri Shiraj Shantilal Zaveri has deposed in his examination-in-chief that draft advertisement at Ex.31 was given to the Gujarat Samachar by Metro Advertising and cash amount for the same has also been paid by it. Whereas Mr.Jayendrabhai Prahladbhai Brahmbhatt has clearly stated that the advertisement has been given through him by one person who approached him with the draft advertisement and, therefore, he went along with that person to the office of Gujarat Samachar and given the draft advertisement and receipt of having paid the cash amount towards the said advertisement was given to that person.

17. In short, one thing which has been established from the oral as well as the documentary evidence which have been produced by the above two witnesses is that the draft advertisement has been given by Metro Advertising so as to publish the same in the daily newspaper Gujarat Samachar on 27-2-1998. But it has not at all been established that said advertisement was given either by the respondent or his agent or any of his authorized person. The petitioner is not in a position to establish that the advertisement in question has been given by the respondent or at his instance by the agent or any other authorized person. The petitioner in his examination-in-chief at Ex.28 has deposed that advertisement in question was given by the opposition candidate, Mohanbhai Hirabhai Patel, but he has categorically admitted in his cross-examination that "it is also true that I had no personal knowledge that the above advertisement was given by Mohanbhai Hirabhai Patel". This means that he has no personal knowledge

regarding the said advertisement and therefore, his evidence on that aspect cannot be relied upon by the Court. Except the above referred two witnesses, the petitioner has not examined any other witnesses to substantiate the above contention. Facts remain that advertisement dated 27-2-1998 has been published in the daily newspaper Gujarat Samachar but petitioner has failed to prove that said advertisement was given either by the respondent or by his agents or servants. It has been established from the oral evidence of the parties that in past also the petitioner has lost in the assembly election and this time also petitioner has lost the election by a very huge margin. It is very clear that petitioner has secured 4,714 votes only while the respondent has secured 40,421 votes. The candidate of RJD has secured 30,009 votes and candidate belonging to Indian National Congress has secured 7,145 votes. Therefore, keeping in mind the margin of votes between the present petitioner and the respondent, one cannot come to the conclusion that it is a direct impact of the advertisement published in the newspaper. No doubt, the petitioner has relied upon two independent witnesses, but these two independent witnesses in their cross-examination have admitted that they have been brought by the petitioner himself for deposition before the Court. Witness Shankarbhai Dayaljibhai Patel who has been examined at Ex.31 as witness No.2 has deposed that he has read the above news item published in Gujarat Samachar and because of that, he and others have cast vote in favour of Bharatiya Janata Party candidate Shri Mohanbhai Patel. In his cross-examination he has admitted that he knows the petitioner prior to 1985 and he had lost the election while he was a candidate of BJP for Patan Taluka Sander area in the year 1995. He has also admitted that he remained in judicial custody for a period of one month as a result of criminal complaint lodged against him in the year 1985. It is required to be noted that though this witness has stated in his oral evidence in the first para of his deposition that he does not belong to any political party, the said fact has been admitted by him when he was cross-examined. Therefore, it seems that he is an interested witness and he has no regard for the truth. As far as Shri Narottambhai Tribhovandas Patel, the witness No.3, who has been examined at Ex.32 is concerned, he has also admitted that he knows the petitioner since the last 10 to 15 years. So, petitioner is not getting any support from the oral evidence of these two witnesses. Hence, I am of the opinion that the petitioner has failed to establish that the advertisement in question has been given for publishing the same in Gujarat Samachar either by the

respondent or his agents at his instance. He has also failed to establish that his failure in the election is a direct impact of the said advertisement.

18. Though it was contended by the petitioner in the petition and deposed in the examination that respondent has circulated large number of phamlets and distributed ball pens, key chains and other gift articles soliciting the support for the candidature of the respondent, he has failed to prove the same by any of the witnesses examined by him. It is only in last para of his deposition he has stated that he had an opportunity to see that the idols of Lords Ram and Sita and gift articles showing the same signal are being distributed, but he has not deposed anything further that these articles were distributed either by the respondent or his servants or his agents. Moreover, nothing has been brought on record to prove the same.

19. Though the witness No.2 has deposed that after the meeting of BJP, the supporters of BJP candidate, Shri Mohanbhai Patel, had distributed gift articles namely, sticker, pen, key chain and calender, he has admitted in his cross-examination that he does not know who were distributing these gift articles. The witness No.3 has also not deposed anything regarding the same either in the examination-in-chief or in the cross-examination. In short, petitioner is not able to prove his case through any of the witnesses examined by him. Under the circumstances, this Court cannot come to the conclusion that the above gift articles and idols of Lord Ram and Sita, if at all distributed, have been distributed either by the respondent or his agent.

20. In view of what has been discussed above, I am of the opinion that petitioner has failed to prove that the respondent and/or his agents at his instance gave the advertisement in question on 27-2-1998 that the petitioner has withdrawn his candidature in favour of respondent and hence, I reply issue No.1 in negative. Since the petitioner could not prove that the respondent has applied any unfair and corrupt means in the election, I reply issue No.2 also in negative. As the petitioner could not prove issue Nos.1 and 2, I reply issue No.3 accordingly.

21. Having regard to the above facts and circumstances of the case, I pass the following final order:-

O R D E R

This election petition is hereby rejected with no

order as to costs.

(R.P.DHOLAKIA,J.)

radhan/